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In the Supreme Court of the United States

OCTOBER TERM, 1984

ERNEST MENDEL AND
ALBERT MENDEL & SON, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that venue in a prosecution under 18 U.S.C. 1001 for making false statements does not lie in the district where the document containing the false statements was prepared, and that a corporate conviction cannot stand when the conviction of the corporation's employee has been overturned.

1. Following a bench trial in the United States District Court for the Southern District of New York, petitioners were convicted on 38 counts of making false statements in matters within the jurisdiction of the United States Department of Agriculture (USDA), in violation of 18 U.S.C. 1001.[1] Petitioner Mendel was sentenced to concurrent terms of imprisonment of one year and one day on each

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[1]After conviction, the district court dismissed 15 of these counts.

of 10 counts, and to concurrent terms of three years' probation on 13 other counts. He also was fined $50,000. Petitioner Albert Mendel & Son, Inc. (M&S) was fined $100,000. The court of appeals affirmed petitioner M&S's conviction; it ordered a new trial for petitioner Mendel. Pet. App. 1a-25a.

M&S is a corporation located within the Southern District of New York that is engaged in the purchase and sale of cattle. Petitioner Mendel is the corporation's vice president and principal shareholder. Pet. App. 2a.

The evidence at trial established that petitioners falsely certified to USDA that certain cattle had been tested for and found free of brucellosis and tuberculosis (Pet. App. 2a-3a). They did so by substituting blood samples drawn from disease-free bulls for samples taken from the cattle to be certified, and then falsely representing that the blood samples had been drawn from the certified animals. The mislabeled samples were sent to a diagnostic laboratory in Connecticut. Test results from the laboratory declaring the samples free of disease were in turn forwarded to the New York State Agriculture and Markets Department in Albany, New York, within the Northern District of New York. USDA, pursuant to a formal understanding with the Agriculture and Markets Department, then relied upon these results in completing United States Origin Health Certificates that had been partially written up by petitioners (in a way that misidentified the cattle), and that had been hand delivered by petitioners' employees to USDA's Albany office. Pet. App. 3a-5a.

At trial, the government relied in part on the testimony of a veterinarian, Charles Frumerie, to establish that Mendel knowingly and willfully supervised the blood substitution and false certification. After Frumerie testified, the trial court declared that it would discount much of his testimony

because it found him "completely incapable of remembering these things" (Pet. App. 8a). Following the close of testimony, however, the court chose to credit Frumerie's testimony in part (*id.* at 9a). The court then convicted both petitioners.

The court of appeals affirmed the conviction of petitioner M&S, but vacated the conviction of petitioner Mendel. The Second Circuit concluded that Mendel had relied on the trial court's original statement that it would discount Frumerie's testimony when Mendel decided not to introduce impeachment testimony, call certain witnesses, or testify in his own defense. The court therefore held that Mendel's defense had been prejudiced, and it ordered him retried. Pet. App. 10a-16a. But the court found no prejudice to M&S's defense, noting that M&S employees undoubtedly had prepared and submitted the false statements. *Id.* at 16a-17a. The court of appeals also rejected both petitioners' claim that venue lay in the Northern rather than the Southern District of New York, explaining that "[v]enue under 18 U.S.C. § 1001 lies where a false statement is prepared and signed, though it may have been filed elsewhere" (Pet. App. 20a).

2. Petitioners' challenge to the venue determination made by the lower courts is without merit and does not warrant further review. It is well settled that venue in a criminal case is determined by the locus of the offense (see *Armour Packing Co.* v. *United States,* 209 U.S. 56, 76 (1908)), which in turn is "determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson,* 328 U.S. 699, 703 (1946). Venue in crimes that involve several criminal acts may lie in any district where the "offense was begun, continued, or completed." 18 U.S.C. 3237(a). Applying these rules, the court of appeals correctly held that venue properly lay in the

Southern District of New York "because the false documents in this case were made" there (Pet. App. 21a).

Petitioners nevertheless contend that venue properly was placed only in the Northern District of New York, where the Origin Health Certificates were received by USDA, because the certificates were hand delivered rather than mailed to USDA's Albany office. Only when a false statement is mailed rather than hand delivered to its recipient, petitioners assert, does venue lie in the district in which the statement is made (Pet. 7-8). But none of the appellate cases cited by petitioners (Pet. 8) base their holdings upon this novel distinction. To the contrary, petitioners' crime involved a single enterprise that began with the making of false statements in the Southern District of New York (see Pet. App. 19a) and ended with their delivery to USDA in the Northern District. This offense plainly was "begun" in the Southern District.[2]

Similarly, petitioners' reliance on *Travis* v. *United States,* 364 U.S. 631 (1961), is misplaced. In *Travis,* the defendant was charged with making false statements in a matter within a federal agency's jurisdiction by filing false affidavits under the since—repealed Section 9(h) of the National Labor Relations Act (61 Stat. 146, 65 Stat. 602 (repealed 1959)). That provision barred the National Labor Relations Board from investigating charges filed by labor unions "unless there [was] on file with the Board an affidavit" of a specified type. The Court therefore held in *Travis* that venue lay only where the false affidavit was filed because "[t]he words of the Act — 'unless there is on file

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[2]Petitioners are incorrect in suggesting that *Reass* v. *United States,* 99 F.2d 752 (4th Cir. 1938), is inconsistent with this conclusion. *Reass* held that venue lies where fraudulent documents are delivered in cases involving the now repealed 12 U.S.C. (1940 ed.) 1441(a) (repealed 1948); it therefore is not relevant to this case.

with the Board' — suggest * * * that the filing must be completed before there is a 'matter within the jurisdiction' of the Board within the meaning of the false statement statute." 364 U.S. at 636 (footnote omitted). Thus, "[t]he *locus* of the offense [was] specified; and only the single act of having a false statement at a specified place [was] penalized." *Id.* at 637 (emphasis in original). Here, in contrast, the filing of an Origin Health Certificate is not a condition precedent to USDA's assertion of jurisdiction over the shipment of diseased cattle in interstate or foreign commerce, and there plainly is no provision in any statute specifying the locus of the offenses that are charged in this case.[3]

3. Petitioner M&S also is incorrect in asserting that the court of appeals should have vacated its conviction when it concluded that Mendel's defense had been prejudiced by the district court's statements regarding Frumerie's testimony. Although it did not identify individual employees other than Mendel who committed criminal acts, the court of appeals had no difficulty finding that "M&S, acting as it must through its employees, made and used the reports and statements on which the indictment was brought, and * * * delivered them to Albany" (Pet. App. 16a). That is enough to support the corporate conviction. Cf. *United States* v. *Cincotta,* 689 F.2d 238, 242 (1st Cir.), cert. denied, 459 U.S. 991 (1982). In any event, the factual question whether the Second Circuit was correct in concluding that M&S's defense was unaffected by the district court's remarks does not warrant review in this Court.

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[3]Petitioners are incorrect in suggesting (Pet. 11) that 9 C.F.R. 91.3 is analogous to Section 9(h) of the National Labor Relations Act. Section 91.3 does not condition USDA jurisdiction on the filing of a certificate; it simply describes the information that certificates must contain and requires that they be endorsed by an authorized veterinarian.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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